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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ARTHUR ROY MELENDEZ,

Defendant and Appellant.

2d Crim. No. B217002
(Super. Ct. No. 2007025498)
(Ventura County)

Arthur Roy Melendez appeals a judgment following his conviction for committing a forcible lewd act upon a child, penile manipulation (Pen. Code, § 288, subd. (b)(1), count 1); a forcible lewd act on a child, sodomy (§ 288, subd. (b)(1), count 2); aggravated sexual assault on a child by forcible oral copulation (§ 269, subd. (a)(4), count 3); dissuading a witness by force or threat (§ 136.1, subd. (c)(1), count 4); with jury findings that in committing the offenses in counts 1 and 2, Melendez personally used a knife (§ 667.61, subds. (b), (c), (e)(4)), his lewd acts involved substantial sexual conduct on a child under 14 years of age (§ 1203.066, subd. (a)(8)), and he kidnapped the victim with movement, which substantially increased the child's risk of harm (§ 667.61, subd. (d)(2)).

We conclude, among other things, that 1) substantial evidence supports the jury's special kidnapping finding that Melendez's movement of the victim substantially increased the child's risk of harm, 2) Melendez has not shown that his trial counsel was

ineffective by not moving to exclude his statements to police, and 3) the trial court did not err by imposing consecutive terms on counts 1 through 3. We affirm.

FACTS

On the evening of July 3, 2007, J.D., 12 years old, went to the home of a friend to watch a movie. Melendez, his friend's brother, was in the house drinking beer. Melendez went into the living room, watched part of the movie and left.

At 8:00 p.m., after the movie ended, J.D. walked home. As he walked through an alley, he heard Melendez say, "Hey, come here." The two of them talked for about 90 minutes as Melendez drank beer from a red and white Budweiser can.

Melendez pulled out a knife and told J.D. not to say anything. J.D. testified that at knife point Melendez forced him to walk "to a darker part of the alley." As they walked through the alley, Melendez said, "[K]eep walking to where it's darker." As they continued to walk "further down the alley," it became "darker and darker." J.D. had trouble seeing where he was going.

Melendez took J.D. to a section of the alley between two buildings where there were no street lights and told J.D. to "go right there." J.D. testified that Melendez "unbuttoned" J.D.'s shorts, "put his hand in [J.D.'s] pants," and began rubbing J.D.'s penis.

Melendez next "licked" J.D.'s neck. He pulled J.D.'s shorts and underwear "partially" down. Melendez then got on his knees. J.D. testified that Melendez put J.D.'s penis "into his mouth" and Melendez began "licking it" with his tongue.

Melendez ordered him to walk to another part of the alley near a "little house." J.D. was standing facing a wall. Melendez got behind him. He pulled J.D.'s shorts and underwear down to his ankles. He told J.D. to be quiet. J.D. heard the zipper on Melendez's pants "go down." J.D. testified that Melendez "tried to put his penis" in J.D.'s "anus." The prosecutor asked J.D., "Did you feel something go in just a little bit?" J.D.: "Yes." After "six seconds passed, there was a noise," which sounded like a door closing in one of the houses near the alley. Melendez stopped his sexual assault and told J.D. "[p]ut them up" and"[f]ollow me back to the house."

As they walked back, Melendez told J.D. that he knew where he lived, and if he said anything, he would kill him.

Julie Leon, a sheriff's department forensics expert, testified that Melendez's DNA was found on swabs taken from J.D.'s neck and penis.

Deanna McCormick, a certified forensic nurse, concluded that "there was penetration" of J.D.'s anus based on the bruising, redness and the location of a pubic hair in that area. She said it was "consistent with someone placing their penis in the anus and trying to force it in."

In the defense case, Police Officer Crystal Walker testified that on the evening of July 3, 2007, J.D. told her that Melendez "took out a knife right before he put his penis in his anus." She said she did not recall J.D. saying that Melendez "had touched [J.D.'s] penis in any way."

Melendez did not testify.

DISCUSSION

I. *Sufficiency of the Evidence for the Special Kidnapping Findings*

Melendez contends that there was insufficient evidence to support the jury's kidnapping findings. He claims there is no evidence that in moving the child to commit the sexual acts that he substantially increased the danger to the victim. We disagree.

In deciding the sufficiency of the evidence, we draw all reasonable inferences from the record to support the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We do not weigh the evidence or decide the credibility of the witnesses. (*Ibid*.)

Punishment for a sexual offense committed on a child (§ 288, subd. (b)) is increased where "[t]he defendant kidnapped the victim . . . and the movement of the victim substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense . . . ." (§ 667.61, subd. (d)(2).)

Evidence that a defendant's movement of the victim is insubstantial or "merely incidental" to the commission of the sex offense is insufficient to support the required finding. (*People v. Dominguez* (2007) 39 Cal.4th 1141, 1152.) But the risk of

harm to the victim is substantially increased where "the movement decreases the likelihood of detection, increases the danger inherent in a victim's foreseeable attempts to escape, or enhances the attacker's opportunity to commit additional crimes." (*Ibid*.) "[W]here a defendant moves a victim from a public area to a place out of public view, the risk of harm is increased even if the distance is short." (*People v. Shadden* (2001) 93 Cal.App.4th 164, 169.)

Melendez claims that his offenses did not take place in a "remote rural road"; they occurred in an alley "in an urban, densely populated Oxnard neighborhood." He suggests that there could be no additional risk of harm to the victim because this was an open public area. But "[c]ourts have held that moving a victim to a more isolated open area which is less visible to public view is sufficient." (*People v. Aguilar* (2004) 120 Cal.App.4th 1044, 1049.)

In *Aguilar*, the defendant moved the victim down a sidewalk at night, from an area illuminated by a porch light to an "extremely dark" area. Even though the offense occurred at night in a public area, the movement to a darker area constituted sufficient evidence of a substantially increased risk of harm to the victim. (*People v. Aguilar*, *supra*, 120 Cal.App.4th at p. 1049.)

Melendez argues that the alley was dark and there was no evidence that he moved the child to a darker area. We disagree. J.D. testified that at knife point Melendez forced him to walk "to a darker part of the alley." He testified that Melendez told him to "keep walking to where it's darker." The prosecutor asked, "So the further down the alley you got to where you ended up, it is getting darker and darker?" J.D.: "Yes." Melendez claims that this answer was the product of the prosecutor's leading question. But there was no objection to the question by the defense, and the answer was unequivocal. J.D. testified that the area where the initial attack took place was so dark he had trouble seeing where he was going. He was in-between two buildings where the lights were off and there were no street lights.

J.D. testified that for the next sexual assault Melendez ordered him to go near a "little house" where he was facing a wall. This area was "totally dark." After

Melendez began his sexual assault, J.D. heard the sound of a door closing in one of the houses. Melendez immediately stopped the assault. The jury could reasonably infer that Melendez took J.D. to the darkest area to commit his sex crimes without detection, and that he stopped as soon as he realized there was a possibility his crimes would be discovered. The evidence is sufficient.

II. *Ineffective Assistance of Counsel*

Melendez contends that his trial counsel was ineffective because he did not attempt to exclude evidence of Melendez's statements to police. We disagree.

Ineffective assistance is established by showing that "counsel's performance was deficient" and "the deficient performance prejudiced the defense." (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) "[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 502.)

Melendez claims that his statements to police were involuntary and the product of a promise that police would reduce the charges if he made admissions. We disagree.

Before Melendez made any statements, Detective Sharon Giles advised him of his *Miranda* rights. The recorded interview follows, in pertinent part:

"[Giles:] I don't know what happened last night but I do believe this kid[.] . . . I believe him and I have some evidence so what's gonna happen today is that . . . evidence is gonna be processed. And then I'm gonna know whether or not it's you. That's what I'm trying to tell you so my suggestion is that you be honest with me. Okay? *'Cause being straight up with me is gonna go a long ways for you*. Okay? I already know what I know. And I'm giving you the opportunity to tell me . . . what took place. . . . [Y]ou got some kid that's gonna try to bone you and saying that you fucking took him at knife point and . . . all this shit and then that just adds some more time . . . to your record. . . . I don't know maybe he did come onto you. You say that he . . . has some issues. Obviously. You know, but I know something happened. *I just want you to be honest with me*. That's all I want. . . . I'm not here to judge you Arthur. Okay? . . . I

work sex crimes. . . . You're not gonna tell me anything that's gonna shock me. *But I can help you if you wanna tell me what happened*.

"[Melendez:] How can you help me though?

"[Giles:] *How can I help you? Well it makes a big difference on . . . whether or not you're telling the truth. And what I . . . decide to charge you with*. . . . I have DNA. . . . Probably in the next 20 minutes I'm gonna know whether or not it's your . . . stuff. So if it was your penis that was inside his ass, it was your mouth that was on his dick, and it was your hands that touched his penis. Then I'm gonna know. Excuse me 100% sure I'm gonna know. So I just need you to tell me what happened. [¶] . . . [¶] . . . *[H]ow I'm gonna help you is the difference between did you force the kid to do it or was he . . . a willing participant? Excuse me. That's gonna make a big difference on--if you do any time. Do you understand that? I mean a huge difference. This kid is saying that you took him at knife point*. . . .

"[Melendez:] See now that's another lie. . . . [¶] . . . [¶] . . .

"[Giles:] . . . I think something happened between you guys. But I don't think . . . you took him at knife point. Am I right?

"[Melendez:] . . . You're right on that one. I didn't take him at knife point. [¶] . . . [¶]

"[Giles:] How did your DNA--

"[Melendez:] . . . I mean yeah like you said maybe he did come at me and did something stupid and he just wanted to do that just to get me in the bling, just to get me in the mix.

"[Giles:] . . . How would your pubic hair get up his ass . . . .

"[Melendez:] Maybe he forced me to do it okay? [¶] . . . [¶]

"[Giles:] [A]t some point . . . your penis . . . ended up in the butt hole of his ass. And your mouth was on his penis. So tell me how that stuff happened.

"[Melendez:] Cause he was fucking forcing me to do it."

(Italics added.)

"[I]nvestigating officers are not precluded from discussing any 'advantage' or other consequence that will 'naturally accrue' in the event the accused speaks truthfully about the crime." (*People v. Ray* (1996) 13 Cal.4th 313, 340.) "The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable." (*Ibid.*)

Here Giles did not make a specific promise that the charges would be reduced if Melendez made admissions or that he would receive any particular sentence. She encouraged him to tell the truth. The statement that there would be a huge difference based on whether or not he used a knife is accurate. The statement that his truthfulness would be a factor in determining the charges against him is correct. If the police believed he was telling the truth about not using a knife, that would make a difference in the charges and that would have been to his benefit. But the police and the prosecution obviously felt he was lying after he said the 12-year-old child forced him to have sexual relations. Melendez "was repeatedly encouraged by [Giles] to tell the truth and was given to understand that a truthful statement would be to his advantage. This type of encouragement is permissible." (*People v. Vasila* (1995) 38 Cal.App.4th 865, 874.)

Melendez's statements were largely self-serving, qualified, and sarcastic. A substantial part of what he told the police was consistent with his defense at trial. He told Giles that he did not pull a knife. Melendez's trial counsel told the jury, "Melendez tries to seduce [J.D.] by kissing him, fondling him, orally copulating him, all the while 12-year-old [J.D.] . . . is . . . confused. *All of it not with a knife*; all of it not by forcible kidnapping; all of it is a crime, a very serious crime, but not what's alleged by the prosecution." (Italics added.) From the totality of circumstances, we conclude that Melendez voluntarily made statements which he felt were helpful to him. There was no coercive or threatening police conduct. Given the strength of the prosecution's case, including the medical and DNA evidence, the exclusion of Melendez's statements to police would not have changed the result. Consequently his counsel was not ineffective for not moving to exclude his statements.

III. *The Sentence*

The trial court sentenced Melendez to an aggregate term of 68 years to life. It imposed consecutive sentences on counts 1 through 3 (counts 1 and 2: 25 years to life for each count; count 3: 15 years to life). It imposed a three-year sentence on count 4.

Melendez contends that 1) there was an insufficient interval between the sexual offenses in counts 1 through 3 (penile manipulation, sodomy and forced oral copulation) to justify imposing consecutive sentences, and 2) that the trial court did not make adequate findings. We disagree.

"What the trial court must decide is whether 'the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior.'" (*People v. Irvin* (1996) 43 Cal.App.4th 1063, 1070-1071.)

Here the trial court made the required findings. It said the sexual offenses in counts 1 through 3 "occurred on separate occasions, at which time . . . the defendant had an opportunity to reflect and discontinue his criminal assault on our young victim, but he chose to pursue his crime, and for that reason I intend to impose consecutive, full term consecutive terms on counts 1, 2, and 3." "[W]here, as here, the trial court finds the time and the circumstances were sufficient to afford the defendant with the required opportunity to reflect upon his actions and he thereafter resumed *sexually* abusive conduct, that finding will be upheld unless no reasonable trier of fact could have so concluded." (*People v. Plaza* (1995) 41 Cal.App.4th 377, 385.)

Melendez suggests that these three counts should be treated as one sexual assault. But "a forcible violent sexual assault made up of varied types of sex acts committed over time against a victim, is not necessarily one sexual encounter." (*People v. Irvin*, *supra*, 43 Cal.App.4th at p. 1071.) In *People v. Brown* (1994) 28 Cal.App.4th 591, during the course of a rape, the defendant made eight or nine penetrations into the victim's vagina. The Court of Appeal affirmed consecutive sentences for multiple counts of rape. It said, "[T]he defendant's repenetrations were clearly volitional, criminal and occasioned by separate acts of force and separately punishable by consecutive sentences." (*Id.* at p. 601.) "Each time S. struggled and defendant's penis came out, he could have

chosen to stop his attack on S. and have been convicted of and punished for fewer counts of rape." (*Ibid.*)

Here Melendez did not engage in one type of sexual activity separated by delays or intervals. These three counts involved "varied types of sex acts"--penile manipulation, sodomy and oral copulation.

As the Attorney General correctly notes, after committing oral copulation, Melendez did not immediately commit the lewd act of anal penetration. Instead, he ordered J.D. to move to a new location and face a wall. He then pulled J.D.'s shorts and underwear down to his ankles. He told J.D. to be quiet. Melendez then pulled his pants' zipper down to commit the sexual assault. After committing the lewd act of penile manipulation, and before committing forced oral copulation, Melendez licked J.D.'s neck. He then pulled J.D.'s shorts and underwear partially down. Melendez got on his knees before committing that assault. Melendez has not shown why the trial court could not reasonably infer that Melendez had time to reflect and "could have chosen to stop his attack" before committing these offenses. (*People v. Brown, supra*, 28 Cal.App.4th at p. 601.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

Patricia M. Murphy, Judge

Superior Court County of Ventura

Richard E. Holly, under appointment by the Court of Appeal, for Defendant and Appellant.

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